REQUEST FOR COMMENTS ON THE DEFINITION OF "SPECIALLY DESIGNED"

Notice of inquiry; request for comments October 29, 1997 (62 FR 56138)

PUBLIC COMMENTS

SD-1	William A. Root	(11/14/97)
SD-2	Donald L. Hammond	(12/8/97)
SD-3	Richard J. Sheil	(1 2/9/97)
SD-4	IBM Corporation	(12/10/97)
SD-5	Regulations and Procedures Technical Advisory Committee	(12/12/97)
SD-6	Industry Coalition on Technology Transfer	(12/18/97)
SD-7	Honeywell Inc.	(12/18/97)
SD-8	Association for Manufacturing Technology	(12/19/97)
SD-9	Dr. Gregory C. DeSantis	(12/20/97)
SD-10	SWEC Power	(12/22/97)
SD-11	Semiconductor Industry Association	(12/29/97)
SD-12	Robert J. Anstead	(11/28/97)
SD-13	American Bar Association	(2/24/98)

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Regulatory Impact

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

SAAB Aircraft AB: Docket 97-NM-135-AD.

Applicability: Model SAAB SF340A series airplanes having serial numbers –121, and –125 through –159 inclusive; and Model SAAB 340B series airplanes having serial

numbers -160 through -360 inclusive; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified. altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent leakage of the fire extinguishing agent, which could prevent proper distribution of the agent within the lavatory waste bin in the event of a fire, accomplish the following:

(a) Within 3 months after the effective date of this AD, accomplish paragraphs (a)(1) and (a)(2) of this AD in accordance with Saab Service Bulletin SAAB 340–25–235, dated December 11, 1996.

(1) Perform an inspection to determine the serviceability of the fire extinguisher in the forward lavatory waste bin, in accordance with the service bulletin. If any discrepancy is found, prior to further flight, accomplish the repair or replacement of the fire extinguisher, as specified in the service bulletin.

(2) Install a placard adjacent to the fire extinguisher in the forward lavatory waste bin in accordance with the service bulletin.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager. International Branch, ANM-116, FAA. Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager. International Branch, ANM-116.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM-116.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Note 3: The subject of this AD is addressed in Swedish airworthiness directive SAD No 1–106, dated December 12, 1996.

Issued in Renton, Washington, on October 23, 1997.

James V. Devany,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service. [FR Doc. 97–28616 Filed 10–28–97; 8:45 am] BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Chapter VII

[Docket No. 971014244-7244-01]

Request for Comments on the Definition of "Specially Designed"

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Notice of inquiry; request for comments.

SUMMARY: The Bureau of Export Administration (BXA) is reviewing the use of the term "specially designed" as it pertains to items controlled on the Commerce Control List (CCL) in the Export Administration Regulations (EAR). BXA is considering developing a definition or definitions of that term that will meet the export control objectives of the regulations while increasing the utility of the regulations to the public.

Although the Export Administration Act (EAA) expired on August 20, 1994, the President invoked the International Emergency Economic Powers Act and continued in effect the EAR, and to the extent permitted by law, the provisions of the EAA, as amended, in Executive Order 12924 of August 19, 1994, as extended by the President's notices of August 17, 1995 (60 FR 42767), August 14, 1996 (61 FR 42527) and August 13, 1997 (62 FR 43629).

DATES: Comments must be received by December 29, 1997.

ADDRESSES: Written comments (three copies) should be sent to Hillary Hess, Regulatory Policy Division (Room 2096), Office of Exporter Services, Bureau of Export Administration, Department of Commerce, PO Box 273, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Jerald Beiter, Office of the Assistant Secretary for Export Administration, Bureau of Export Administration, Department of Commerce, telephone: (202) 482–6105.

SUPPLEMENTARY INFORMATION: A number of U.S. exporters and others have requested that BXA provide a definition of the term "specially designed" in order to assist them in classifying certain items according to the Commerce Control List. In responding to this request, BXA intends to examine the use of the term in multilateral control regimes, use of the term by other countries in their export control regimes, the opinions of other government agencies, and the opinions of members of the public. Our goal is to

fulfill the export control purposes behind the regulations, to adhere to multilateral regime practices, and to make the regulations easier for the public to use. BXA is particularly interested in the comments of those who have experience classifying items on the Commerce Control List. Comments should be as specific as possible.

It may not be possible to write a single definition that is accurate for all purposes, but BXA will make its best effort to respond to the concerns raised by the public comments.

BXA will consider requests for confidential treatment. The information for which confidential treatment is requested should be submitted to BXA separately from any non-confidential information submitted. The top of each page should be marked with the term "Confidential Information." If the submission fails to meet the standards for confidential treatment, BXA will return it. A non-confidential summary must accompany such submissions of confidential information. The summary will be made available for public inspection.

Information accepted by BXA as confidential will be protected from public disclosure to the extent permitted by law. Communications between agencies of the United States Government or with foreign governments will not be made available for public inspection.

All other information relating to the notice will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, BXA requires written comments. Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying.

The public record concerning these comments will be maintained in the Freedom of Information Records Inspection Facility, Room 4525, U.S. Department of Commerce, 14th Street and Pennsylvania Avenue, NW, Washington, DC. 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in part 4 of Title 15 of the Code of Federal Regulations.

Information about inspection and copying of records at this facility may be obtained from Margaret Cornejo, BXA Freedom of Information Officer, at the above address or by calling (202) 482–2593.

Dated: October 20, 1997.

William V. Skidmore,

Acting Assistant Secretary for Export Administration.

[FR Doc. 97–28649 Filed 10–28–97; 8:45 am] BILLING CODE 3510–33–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 773, 778 and 843 RIN 1029-AB94

Ownership and Control—Redesign

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior. ACTION: Advanced notice of proposed rulemaking; notice of public meetings.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) will hold, upon request, meetings to solicit comments, concerns, and new ideas regarding the drafting of new ownership and control, permit information and improvidently issued permits regulations.

OSM also invites written comments regarding the drafting of these regulations. A concept/issue paper has been prepared to assist those interested in commenting or preparing for the meetings. The paper is a compilation of concepts and issues currently under consideration; however, OSM is not limited to those listed and encourages new concepts or ideas for consideration. DATES: Written comments OSM will accept written comments until 5:00 p.m., Eastern Time on December 15, 1997.

Public meetings: OSM will meet with interested persons upon request to solicit comments on the drafting of the new regulations until December 15, 1997. In order to make proper arrangements for meetings, request for meetings should be made prior to December 1, 1997.

ADDRESSES: Written comments and requests for concept/issue paper: Hand deliver or mail to Earl Bandy. Office of Surface Mining Reclamation and Enforcement, AVS Office, 2679 Regency Road, Lexington, Kentucky 40503; telephone (800) 643–9748; Email:ebandy@osmre.gov.

Telefax: Copies of the concept/issue paper may be obtained from FAX ON DEMAND by calling 202–219–1703 and following the instructions on the recorded announcement.

Public meetings: Upon request OSM staff will be available to meet with

interested persons, individually or in groups, during the comment period in the following locations: Lexington, Kentucky; Washington, D.C.; Knoxville, Tennessee; Pittsburgh, Pennsylvania; Alton, Illinois; and Denver, Colorado. Any individual who requires special accommodation to attend a meeting should also contact the person listed under FOR FURTHER INFORMATION CONTACT.

FOR FURTHER INFORMATION CONTACT:

Earl Bandy, Office of Surface Mining Reclamation and Enforcement, 2679 Regency Road, Lexington, Kentucky 40503; Telephone (606) 233–2796 or (800) 643–9748. E-mail: ebandy@osmre.gov.

SUPPLEMENTARY INFORMATION: On April 21, 1997 (62 FR 19450), OSM issued interim final regulations regarding 30 CFR Parts 773, 778 and 843-Ownership and Control; Permit Application Process; Improvidently Issued Permits. This action was taken in response to a decision by the U.S. Court of Appeals for the District of Columbia Circuit invalidating the previous rules as being inconsistent with Section 510(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). In issuing these interim final regulations, OSM invoked the "good cause" exemption of the Administrative Procedure Act (APA) at 5 U.S.C. 553(b)(3)(B). This provision allows an agency to issue a rule without prior notice or opportunity for public comment "when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." OSM invoked the APA "good cause" exemption for the reasons described in the preamble to the interim final regulations (62 FR 19451-19452). In doing so, OSM stated that the rules were intended to be interim and that it would seek public comment on any resulting proposed regulatory changes.

In order to fulfill this commitment, OSM is seeking to involve the public in advance of developing a proposed rule. OSM will follow standard procedures by seeking comments and holding public hearings on the proposed rules when they are published in the Federal Register.

Dated: October 21, 1997. Mary Josie Blanchard,

Assistant Director, Program Support.
[FR Doc. 97-28486 Filed 10-28-97; 8:45 am]
BILLING CODE 4310-05-M

William A. Root 4024 Franklin Street Kensington MD 20895 Tel. & FAX 301 942 6720

November 14, 1997

Hillary Hess
Regulatory Policy Division (Room 2096)
Office of Exporter Services
Bureau of Export Administration
Department of Commerce
P.O. Box 273
Washington DC 20044

Re: Request for Comments on the Definition of "Specially Designed" in October 29, 1997, Federal Register

Dear Hillary:

I am submitting the following comments as a member of the Regulations and Procedures Technical Advisory Committee (RPTAC). They also constitute my report on research in the COCOM archives in Paris from October 6 to October 9, which was arranged by the Department of State following a discussion in the Materials Processing TAC on September 4. For this reason, I am sending a copy of this letter and the accompanying classified letter to the Department of State and request that you make both this letter and the classified letter available to the Materials Processing and Regulations and Procedures TACs for their review.

Upon request, I would be pleased to make available copies of the documents cited in this letter. I understand that you already have copies of the documents cited in the classified letter. I have not retained copies of any classified documents.

Existing definition

There has been a consistent, official, and publicly available U.S. Government definition of "specially designed" in the past which should be respected and followed until officially and publicly revised. This is the definition appearing in Part 772.

Although the definition as it appears in Part 772 is marked "(MTCR context)," the U.S. Government has recognized its applicability also in the COCOM context since 1951.

This recognition is evidenced in both publicly available and still confidential documents. The COCOM documents cited in this letter are over 30 years old and are, therefore, unclassified and publicly available as a result of a 1995 decision to this effect by the former COCOM member governments. Still classified COCOM documents less than 30 years old confirm this definition. They

are cited and described in a separate confidential response to the Federal Register request for comments. This paragraph constitutes the non-confidential summary which must accompany the submission of confidential information.

The key words in the MTCR definition appearing in Part 772 are "unique properties" and "has no other function or use." Unclassified documents supporting a definition with this same "used-solely-for" substance for other than MTCR items include the following:

- In 1951, the U.S. proposed that COCOM embargo components "used only in (embargoed) equipment." This proposal was withdrawn when Administrative Principle 4 (AP 4) was agreed. AP 4 provided that "the object of the embargo ... should not be defeated by the export of component parts. It was limited to "specialized" parts and did not apply to parts which were "interchangeable with parts of unobjectionable (i.e., unembargoed) items." Subsequently, COCOM included in each relevant COCOM item "specialized," later "specially designed," parts, components, accessories, or controls. COCOM Doc. 437 proposal A901, Doc. 560 paras 2 and 4, Doc. 619, and Doc. 656 para 18(b).
- The 1954 and 1958 versions of the COCOM strategic criteria included the expression "designed specially or used principally for the development, production or utilization of arms ..." Thus, COCOM construed "specially designed" to be different from "used principally for," apparently because COCOM intended "specially designed" to mean "used-solelyfor," as indicated in the AP 4 history. COCOM Docs. Annex B to CG XII and 2869.27.
- From 1952 to 1965, the Commerce control list used the term "specially fabricated" to modify parts, accessories, and control equipment. This expression was also used in one COCOM item (1129) and in a U.S. proposal to amend another COCOM item (1072). In other items, COCOM used "specially designed" or "specialized" where the U.S. used "specially fabricated." Eventually, both the U.S. and COCOM standardized on the expression "specially designed." The U.S. defined "specially fabricated" as follows (emphasis added):

The term "specially fabricated" is used to describe parts which are so constructed as to be usable (1) with only one machine or type of machine, for which a single classification is provided in Schedule B, or (2) for a well-defined group of the same type machines (having the same general function) involving more than one classification in Schedule B. The term "specially fabricated," as used in Schedule B, carries no

implication that the item to which it is applied was individually designed or manufactured. It indicates that the form of the item is such that its use is limited to the particular machines or equipment for which it is described as being specially fabricated. The fact that a part, in a given instance, is being shipped for use on a given machine, does not, of itself, constitute a basis for considering the part to be specially fabricated for the machine in which it will be incorporated. It is not a specially fabricated part for that machine unless it is so constructed that its use for all practical purposes is limited to that machine.

See Schedule B, Statistical Classification of Domestic and Foreign Commodities Exported from the United States, Introduction, para 21, Department of Commerce, Bureau of the Census, editions of January 1, 1952, and January 1, 1958 (reprinted January 1962) and COCOM Docs. 3711.NI 2/1, 2/2 revised, & 2/3, REV(63)1129/WP1, REV(63)1129/3 para 17, 3710.72/4, and 4910.72/1 Annex paras 1, 9, and 11. The U.S. Government explicitly recognized that there was no substantive change intended by changes from "specially fabricated" to "specially designed," thus recognizing the applicability of the "specially fabricated" definition to "specially designed." A Department of Commerce notification of Revision of the Commodity Control List dated January 14, 1965, stated:

The revised entries set forth below ... are not intended to make any substantive changes in the export controls applicable prior to January 1, 1965.

Four earlier uses of "specially fabricated" parts and accessories were revised to "specially designed" parts and accessories (two for propellers and one each for aircraft flight instruments and for aircraft landing gear). See Comprehensive Export Schedule page 122, dated July 9, 1964, two entries numbered 79389 and page 124 dated December 4, 1964, entry 79485 and second entry numbered 79487 and Current Export Bulletin 905, page 2, part B. Other Revisions, first paragraph and second, third, and fifth entries numbered 73492 on page 8 and entry 86191 on page 9.

The U.S. definition of "specially fabricated" was accompanied by the following definition of "general purpose" (emphasis added):

The term "general purpose" is used to describe items which are so designed as to be usable as parts of various machines or equipment. All machinery and equipment parts which are not specially fabricated for particular machines are considered to be general purpose parts.

In 1966, the U.S. agreed with a requested UK understanding that "general purpose" pumps which created pressure in isostatic presses would not be embargoed under the U.S. isostatic press proposal, because such pumps would not be specially designed parts. Thus, by defining "general purpose" as everything which is not "specially fabricated" and by stating that the isostatic press item does not include "general purpose" equipment, the U.S. Government has confirmed that "specially designed" in the isostatic press item means "used-solely-for." See Schedule B Introduction para 22 and COCOM Doc. (66)1072/3, paragraphs 11 and 12. For other items there is, undoubtedly, a similar regulatory history of explaining that "specially designed" does not include "general purpose."

In 1959, the Department of Defense proposed that "specially designed" be removed from the text of an item, because (emphasis added):

... Electronic Valve Making Machinery, IL Item 1355(a) (is) defined in such manner as to completely negate embargo controls ... Specifically the present definition restricts the embargo coverage for this item to machinery, equipment and test gear specially designed for the manufacture of various types of embargoed electronic valves ... (It is believed) that the same equipment produces embargoed or non-embargoed materials. We were informed, however, that since this was a UK proposed definition that for negotiating reasons that it would be expedient to accept the definition as proposed.

Department of Defense August 25, 1959, Memorandum to (EDAC) Executive Committee, para. 1.

- This situation arose as a result of deletion of "capable of use" from a 1958 U.S. proposal for item 1355, because the U.S. recognized that "capable of use" was inconsistent with "specially designed," which term had also appeared in that proposal. 1958 List Review: Individual Item Summary IL 1355.
- The Department of Defense memorandum preceded by a few months the first U.S. proposal to add controls "specially designed" for presses to the COCOM embargo, made in December 1959. COCOM Doc. 3710.72/4 and Part (d) of U.S. proposal in POLTO 1166. Thus, the United States recognized that controls specially designed for embargoed presses did not cover general purpose controls which could be used for both embargoed and non-embargoed presses and that the use of "specially designed" might result in nothing being covered.

- In 1963, a U.S. committee recommended continuation of items 1080 and 1086 even though the "used-solely-for" interpretation of "specially designed" meant that these items, like item 1355 described in the preceding bullet, also covered nothing. Ad Hoc Doc. No. 1000, January 31, 1963. Thus the "used-solely-for" interpretation of "specially designed" recorded in a 1975 discussion of these items, which has been cited publicly as evidence in a German case and in the U.S. FMI case, was not an aberration, having been applied in U.S. deliberations concerning these same items twelve years before.
- In 1950's and 1960's discussions of COCOM items for equipment for military use or for munitions manufacture, there were frequent references to the "used-solely-for" interpretation of "specially designed":
 - a. The U.S. expressed the view that equipment capable of manufacturing armaments but also useful for other purposes does not belong on an illustrative list of equipment "specially designed" for that purpose. COCOM Doc. 700.1, .2, .3, Amendment 17, p. 83; and Doc. 2010.39/1, para. 4.
 - b. In 1958, the U.S. proposed adding a new sub-item to IML 18 for climatic conditioning chambers, on the ground that the U.S. knew of no civilian use. COCOM Doc. ML Working Paper/15, 11/6/58.
 - c. France proposed deletion of an item for "repair shops specially designed to service military equipment," because such shops have civilian uses. COCOM Doc. 1745, para. 2.
 - d. COCOM agreed not to use the phrase "specially designed for military use" in embargoing instruments for measuring the speed of sound in water, because such instruments had civilian uses. COCOM Doc. REV(63)ML11/W.P.1; and Annex to Doc. REV(63)ML11/1, paras. 6, 8, and 11.
 - e. Following much confusion from 1964 to 1966 concerning vibration test equipment exception cases, the United States proposed that such equipment be transferred from a sub-item of IML 18 to the Industrial List, because the equipment as described had uses other than for munitions production. The sub-item was subsequently transferred and revised to omit the IML 18 specially-designed-for-munitions-production modifier. Docs. (65)49, 80, 324, 339, 354, 375, 377, 388, 403, 416, 437, 446; (66)130; REV(65)ML18/WP1, 10/5/65; REV(65)ML18/4, 4/25/66; REV(65)ML19/7, 6/1/66.

- Other instances from the 1950's and 1960's confirming the "used-solely-for" interpretation of "specially designed" include:
 - a. The United States proposed a new item for jamming apparatus, because the existing item was limited to apparatus "specially designed" to jam. The United States informed COCOM that "specially designed" does not include apparatus that "can be readily adapted," i.e., had other uses. COCOM Doc. 358, Amendment 4, item 1507; Doc. 512, paras. 1 and 2(d); Doc. 722, para. 2; Doc. 776, para. 6.
 - b. COCOM agreed to add "specially designed" to a metallurgical microscopes item because of the view that the embargo should not cover all microscopes "capable of adaptation," i.e., had other uses. COCOM Doc. 1166, para. 2.
 - c. COCOM agreed to narrow the coverage of diodes by changing "capable of" to "specially designed," i.e., in order to exclude diodes capable of other uses. COCOM Doc. 1425.41/2, para. 2; Doc. 1425.41/6, para. 2.
 - d. In 1959, the U.S. concluded that "accessories ... which can be used with many different modes of computer ... cannot be considered specialized parts of rated computers." O.C. Doc. 1507.
 - e. In 1963, COCOM agreed that AEL 36 did not apply to conventional power generating equipment which, although designed for use in a particular nuclear station, would, in principle, be used with conventional systems. Thus, COCOM considered that equipment designed for a particular use was not "specially designed" for that use if it had other uses. Document REV(63)AEL36/1, paragraphs 6 and 7.
 - f. In 1966, the Netherlands questioned whether particular honeycomb milling equipment was embargoed by item 1081, equipment designed specially for milling aircraft fuselage and wing parts. The Netherlands gave no other use for this equipment, arguing only that COCOM may have intended not to embargo equipment with little capacity. The United States responded that the equipment was "specially designed," i.e., that exclusive use rather than capacity was determining. Documents (66)29 and (66)91,
- My extensive research did not unearth any coherent interpretation of "specially designed" other than "usedsolely-for" or the substantive equivalent. I found nothing

remotely resembling the Dhir "capable of" interpretation. In 1954, the U.S. described the process of adding components to individual items as "the establishment of uniform control over exports of those strategic parts" (emphasis added). Doc. 1555. Thus, there was no intention to ascribe non-uniform meanings to the expression "specially designed components."

Multiple definitions

There may be a need for different terms with different definitions in describing limitations on controls of components of, or technology or software related to, controlled equipment and limitations on controls on equipment of concern because of end-use (such as munitions production). However, confusion resulting from multiple definitions of the same term should be avoided.

If the "used-solely-for" interpretation of "specially designed" were to apply only to items controlled for missile technology reasons and a more restrictive, broader interpretation were to apply to items controlled for other reasons, uncertainty would arise as to the status of items which are controlled for more than one reason, e.g., national security or nuclear proliferation as well as missile technology. The general rule that the more restrictive provision applies would rob the MTCR definition of much of its apparently intended effect.

Unpublished, or even published, differentiation based on assignment of items to various BXA organizational units, such as capital goods vs. electronics, would create great confusion. If "specially designed components" had a broader meaning for capital goods than for electronics, exporters would not know how to classify their products for many reasons:

- there would be a general expectation that "specially designed components" would have the same interpretation throughout the list;
- there would be uncertainty as to which items were capital goods and which were electronics, e.g.:
 - would all ECCNs numbered xBxxx be considered "capital goods" because "B" signifies "test, inspection, and production equipment," even though 3Bxxx is part of "electronics" category 3?
 - would electronic components in other categories be considered "electronics" for this purpose?
 - which definition would be used for electronic components of items designated as "capital goods"?
 - how would components used in both "capital goods" and "electronics" items be treated?

Recommendations

The "used-solely-for" interpretation of "specially designed" is entrenched in the history of COCOM for the past 46 years, MTCR for the past six years, and U.S. export controls based on both these regimes. Therefore, it should not be revised in the absence of compelling reasons.

"Used-solely-for" can, of course, be criticized as being both too broad and too narrow. It is too broad by covering benign components, such as nameplates, general purpose items identified by unique part numbers for convenience, and containers. It is too narrow by not covering critical components also used in uncontrolled equipment because of economies of scale in the production process.

For these reasons, the term "required," as defined formerly by COCOM and now by Wassenaar (peculiarly responsible for achieving controlled characteristics), was developed and applied to controlled technology and some software as they relate to controlled equipment. Perhaps it is now time to consider the ICOTT 1985 recommendation that the term "required" also be used for commodities and for all software.

No formulation other than "used-solely-for" or "peculiarly responsible for achieving controlled characteristics" has been seriously considered in the past and none of the alternatives casually mentioned shows much promise of viability. The Dhir "capable of" interpretation would rob "specially designed" of all meaning. "Design intent" is a subjective, rather than objective, criterion and, for that reason, is inappropriate for controls based on objectively defined items. "Intended end use" is a concept better suited to Part 744 end-use controls than to list-based controls (see the last paragraph of ITAR 120.3). "Predominant use" is inherently unclear.

In any event, the U.S. should not change from "used-solely-for" prior to international agreement in Wassenaar and the MTCR.

The sui generis definition of "specially designed software" used until recently was developed to limit software excluded from control but was also illogically used to determine which software was controlled. It would, similarly, be illogical on its face to use "required" (responsible to achieve controlled characteristics) to determine which components of controlled equipment would qualify for an exclusion clause. The expression "containing no 'required' characteristics" might be suitable for exclusion clauses in items whose control definitions did not include the word "required." "Used-solely-for" may, in a few instances, be reasonable to define what is excluded from control; but this, too, would be illogical if "used-solely-for" were also used to define what is controlled, thereby leaving general

purpose components in limbo. Technical specifications are preferable for exclusion clauses.

An intellectual case can be made to differentiate between the meaning of "specially designed" in "specially designed components" and in "equipment specially designed for (a stated use, such as military, space, nuclear, or munitions production)." Moreover, Commerce regulations must take into account ITAR policy as described in 120.3(a): developed for military application, not have predominant civil application, and not have performance equivalent (form, fit and function) to those of an item used for civil application. Nevertheless, "used-solely-for" is as entrenched for end-use as it is for components, as shown above under "Existing definition."

Sincerely yours,

Tilliam a Root

William A. Root

15 CFR Chapter VII Docket No. 971014244-7244-01

Response to requests for comments on the Definition of "Specially Designed"

December 8, 1997

Donald L. Hammond

Introduction

I am a retired consultant to exporters on the U.S. Export Regulations. I was employed by the Bureau of Export Administration for five years from 1982 to 1987. My responsibilities included the classification of commodities and technology according to the U.S. Export Regulations Commerce Control List (CCL). I was also a U.S. delegate to the Coordinating Committee (CoCom), a Commerce Department member of two Technical Advisory Committees, and a Commerce Department member on U.S interagency committees that recommend changes to the CCL.

When I retired from the U.S. Government in 1987, I was employed by Techexport as a consultant to exporters. One of my principal responibilities was to help exporters classify products according to the CCL. I left Techexport after three years to become a self employed consultant to exporters.

I was employed as a research scientist at the Naval Research Laboratory, Washington, D.C., from April 1959 to December 1982. I graduated from the University of Missouri, Columbia, Missouri, with a Bachelor of Science degree with a major in electrical engineering in 1959.

Suggested Guides to Follow

The definition of "Specially Designed" should be given in conjunction with and in contrast to the definition for "Useable in" and "Capable of". All three terms should be defined in such a way as to draw a clear distinction between "Specially Designed" and "Capable of" and "Usable in".

Multiple definitions for "Specially Designed" should not even be considered. This could only lead to confusion for all users of the CCL.

PAGE 2 "Specially Designed" Definition 12/8/97

Historically the phases "Specially Designed", "Capable of", and "Usable in" have long been used to describe commodities and technology listed on the CCL. An examination of the uses of these phases would lead a layman to the conclusion that they have similar meanings as they have when used in everyday speech in non-export regulation contexts. That is, "Specially Designed" is applied to commodities that are for exclusive use with controlled commodities and no other uses. "usable in" and "Capable of" self evidently apply to a much broader range of commodities which may have applications other than in concert with the subject controlled commodity.

By selecting one of these three terms regulators will continue to have the ability to clearly describe commodities or technology they wish to control. All that is required is to extend the definitions for these terms presently used for missile technology controls to apply to all commodity categories.

Descriptions of controlled commodities should be clearly spelled out. Broad coverage of commodities afforded by the describers "Capable of" and "Usable in" should be used very sparingly if at all. "Specially Designed", even if defined narrowly, also should be used with great care in the CCL.

Recommendation

The definitions for the subject terms given in the Supplement No. 3 to the CCL for the control of missile technology (see page 3) or close facsimiles to them should be applied to all commodities controlled by the CCL where the subject terms are used. A few examples of the application of the definitions, as is done in Supplement No. 3, should be included for clarity.

I believe that following the above suggestions will better communicate the intent of the regulators and will also allow them to clearly list the commodities they wish to control.

Donald L. Hammond

Donald L. Hammond 411 Dorchester Road Falls Church, VA 22046

703-533-7601

PAGE 3 "Specially Designed" Definition Comments December 1997

Supplement No. 3 to 799.1, Definitions

Specially Designed - (MTCR context) - Equipment, parts, components or "software" that, as a result of "development, have unique properties that distinguish them for certain predetermined purposes. For example, a piece of equipment that is "specially designed" for use in a "missile" will only be considered so if it has no other function or use. Similarly, a piece of manufacturing equipment that is "specially designed" to produce a certain type of component will only be considered such if it is not capable of producing other types of components.

Capable of (MTCR context) - See "usable in".

Usable in or Capable of (MTCR context) - Equipment, parts, components or "software" that are suitable for a particular purpose. There is no need for the equipment, parts, components or "software" to have been configured, modified or specified for the particular purpose. For example, any military specification memory circuit would be "capable of" operation in a guidance system.

15 CFR Chapter VII Docket no. 971014244-7244-01

Response to request for comment on definition of "specially designed"

December 9, 1997

Two terms that are used in the EAR to indicate the level of control exercised on a commodity entry are (1) specially designed (2) capable of . The more encompassing of the two terms would be "capable of". That is, the term "specially designed" is applied to commodities that are for exclusive use with a controlled commodity and has no other uses. The term "capable of" is a much broader control that would basically apply when equipment and all associated support equipment is intended to be controlled.

In selecting these terms the regulatory authorities were provide with broad coverage with the use of the term "capable of" and narrow coverage for exclusive use related to single purpose commodities.

 Over the years the Department of Commerce has supported the exclusive use definition for specially designed as defined in Supplement No. 3 to the CCL used for the control of missile technology. I think this procedure and practice should be reinstated thereby giving Government and industry the support of the now questioned definition.

Recommendation: The exclusive use definitions now used in the export regulations (Supplement No 3 of the CCL) for the control of missile technology should be applied for use of the term "specially designed" and "capable of".

Richard J. Sheil 1852 Foxstone Dr. Vienna, Va. 22182

Robert J. Shaif

Office of the CHQ Export Regulation Office

1301 K Street, N.W., Washington, D.C. 20005-3307

December 10, 1997

Hillary Hess
U.S. Department of Commerce,
Bureau of Export Administration,
Regulatory Policy Division (Room 2096)
P.O. Box 273
Washington, D.C. 20044

Subject: "Specially Designed"; Request for Comments

Reference: 62 F.R.; page 56138

Dear Ms. Hess;

The definition of 'specially designed' now included in Part 772 of 15 CFR is simple and clear, provided the delimiting factor of 'MTCR context' is removed.

We propose the following revision:

g. m. nu Bowan

"Specially designed": Equipment, parts, components or "software" which, as a result of "development", have unique properties which distinguish them for certain predetermined purposes. For example, an electronic assembly which is "specially designed" for information security will only be considered so if it has no other function or use. Similarly, a piece of manufacturing equipment which is "specially designed" to produce a certain type of component will only be considered such if it is not capable of producing other types of components.

We appreciate the opportunity to comment on this proposed change.

J. M. McGowan

Regulations & Procedures Technical Advisory Committee

December 12, 1997

Ms. Hillary Hess
Director, Regulatory Policy Division
Room 2096
Bureau of Export Administration
United States Department of Commerce
P.O. Box 273
Washington, D.C. 20044

Re: Comments on the Definition of "Specially Designed"

Dear Ms. Hess:

RPTAC notes that the missile technology definition of "specially designed" which now appears in the regulations is substantially the same as the interpretation of that phrase which the U.S. has used consistently for general applicability since 1951. This is well documented in:

- o a 1951 U.S. proposal that COCOM embargo components "used only in (embargoed) equipment" which then evolved into "specially designed components thereof" wording in numerous CCL items;
- a 1952 Schedule B Export Control List definition of "specially fabricated" as applying to a part "limited to the particular machines or equipment for which it is described as being specially fabricated". This definition was in effect until 1965 when it was replaced by "specially designed" in "revised entries not intended to make any substantive changes in the export controls";
- o a 1975 COCOM record of discussion in which the U.S. delegate explained that "specially designed" is interpreted to mean "used-solely-for" generally throughout the list;
- a 1959 Department of Defense memorandum recognizing that IL Item 1355(a)(is) defined in such a manner as to completely negate embargo controls (since) it restricts the embargo coverage...to...equipment...specially designed for the manufacture of ... embargoed electronic valves (and) the same equipment produces embargoed or non-embargoed materials", and

Page 2 - Ltr. to H. Hess; comments on the Definition of "Specially Designed"

o numerous other documents concerning individual items.

The only other publicly available documented interpretation of "specially designed" seems to be the "capable of use with" government testimony in an on-going court case. Since all components are capable of being used with the equipment of which they are a part, this interpretation would irrationally rob "specially designed" of all meaning.

Accordingly, RPTAC recommends that the Government revise its definition of "specially designed" which now appears in the EAR by simply removing the limitation of its applicability to "MTCR context", thereby taking no action to undo the long-standing interpretation of "specially designed" as used in other contexts.

The October 29 invitation of comment suggests the possibility of multiple meanings for "specially designed". RPTAC vociferously opposes giving any single expression more than one meaning since this might open the door to capricious government action and would result in unnecessary confusion for exporters.

We appreciate the opportunity to comment on this important subject and hope these suggestions are seriously considered.

Sincerely,

Carol Henton Chair, RPTAC

cc: RPTAC members

Caral Henten

ICOTT INDUSTRY COALITION ON TECHNOLOGY TRANSFER 1400 L Street, N.W. Washington, D.C. 20005 Suite 800 (202) 371-5994

December 18, 1997

Ms. Hillary Hess
Regulatory Policy Division, Room 2096
Office of Exporter Services
Bureau of Export Administration
U.S. Department of Commerce
P.O. Box 273
Washington, D.C. 20044

Re: Request for Comments on the Definition of "Specially Designed" (62 Fed.

Reg. 56138, Oct. 29, 1997)

Dear Ms. Hess:

On October 29, 1997, the Bureau of Export Administration (BXA) published a Federal Register notice (the Notice) requesting comments on the definition of "specially designed." 62 Fed. Reg. 56138. The Industry Coalition on Technology Transfer (ICOTT) hereby responds to the Notice.

ICOTT wrote to Under Secretary William Reinsch on June 20, 1995 asking that BXA publish a definition of specially designed--not so much because ICOTT had any doubt as to the meaning of the term as because the federal government had propounded, in a criminal prosecution known as *United States v. Lachman et al.*, a definition of the term sharply at odds with the longtime understanding of industry. The defendants in *Lachman* were charged with exporting a control panel for a hot isostatic press without obtaining a required export license. At trial, Dr. Surendra Dhir, a former BXA employee, testified that "specially designed" means "effective capability to control." Thus, Dr. Dhir concluded that the control panel was "specially designed" because it had "effective capability to control" a hot isostatic press.

The June 1995 ICOTT letter asked that the definition be one of "exclusive use", stated as follows: "A product or a component is only specially designed for a certain product or purpose if it can only be used for that certain product or purpose." On September 25, 1995 Mr. Reinsch responded that "it would be inappropriate for BXA to interfere with a matter currently in litigation." Copies of those letters are annexed to this submission.

Although the *Lachman* case remains in litigation, more than two years have passed since our exchange of correspondence with Under Secretary Reinsch. BXA apparently has decided that neither industry nor the government should have to wait indefinitely for the case to be resolved.

ICOTT favors early clarification of the issue without regard to the status of the litigation.

ICOTT continues to believe that BXA should publish the definition of "specially designed." We see no need for debate, however, as to the meaning of the term. The federal government and industry long have had a common understanding of what "specially designed" means: A product or a component is only "specially designed" for a certain product or purpose if it can only be used for that certain product or purpose. ICOTT respectfully disagrees with the implication of the Notice is that there currently is no agreed upon definition of the term.

We also believe that it would be inappropriate and confusing to have more than one published definition for the term "specially designed." If the definition of "specially designed" does not meet the need for a particular entry on the Commerce Control List (CCL), then a phrase other than "specially designed" should be used and should be separately defined in part 772.

The government's testimony in *Lachman* as to the meaning of "specially designed" represented a radical departure from accepted practice on the part of the government and industry. A change from the existing definition would affect directly and profoundly the thousands of exporters who belong to ICOTT's member trade associations, inter alia, by increasing substantially the number of exports that require validated licenses. That in turn would cost exporters--and our nation's economy--significant time, sales, and jobs.

The Export Administration Regulations (EAR) and interpretations of the EAR--as they have existed continuously for twenty years or more--are consistent only with an "exclusive use" interpretation of the phrase "specially designed." For example, the events underlying the *Lachman* prosecution allegedly occurred in 1988. The 1988 CCL, 15 C.F.R. § 399.1, supp. 1 (1988), differentiated between the phrases "specially designed" and "capable of." Both phrases were used independently throughout the 1988 CCL. The phrase "specially designed" appeared in ninety different ECCNs, while "capable of" appeared in eight. In three 1988 ECCNs (1312A, 1365A, and 1514A), the phrase "specially designed" appeared in the *same* ECCN as the phrase "capable of," supporting the conclusion that the drafters intended different meanings for each phrase. The same is true of the current CCL, which includes a number of ECCNs that contain both phrases--"specially designed" and "capable of"--in the same entry.

The various ECCNs composing the CCL should be read consistently. An examination of the language and legislative history of various ECCNs--including 1312A, the ECCN at issue in *Lachman* (now ECCN 2B004)--demonstrates that an "exclusive use" interpretation of the phrase "specially designed" is correct. For example, the 1988 version of ECCN 5999B (now ECCN 0A983) required validated licenses for "*specially designed* implements of torture." 15 C.F.R. § 399.1, supp. 1, ECCN 5999B (1988) (emphasis added). Most implements are *capable of* being used for torture. If "specially designed" means "capable of," as the government claimed in *Lachman*, then ECCN 5999B controlled a broad range of civilian goods. Such was not the case. Rather, ECCN

5999B was intended--and consistently interpreted by the Department of Commerce--to control only those implements that could *exclusively* be used for torture.

A commodity interpretation in the 1988 EAR refers to "Computer Numerical Control (CNC) units, *specially designed* for controlling machine tools" and goes on to state that CNCs using general purpose computers are *not* "specially designed." 15 C.F.R. § 399.2, supp. 2, interp. 7(b)(1) (1988) (emphasis added). Given that general purpose computers are *capable of* use for CNC purposes, "specially designed" here must mean "designed only for CNC use" and not merely "capable of" such use.

This common understanding of "specially designed" was followed when in 1991 the Department of Commerce adopted a CCL supplement that sets forth definitions applicable to the CCL as a whole. This supplement provides in pertinent part:

Specially designed (MTCR context) -- Equipment, parts, components or "software" that, as a result of "development", have unique properties that distinguish them for certain predetermined purposes. For example, a piece of equipment that is "specially designed" for use in a "missile" will only be considered so if it has no other function or use. Similarly, a piece of manufacturing equipment that is "specially designed" to produce a certain type of component will only be considered such if it is not capable of producing other types of components.

15 C.F.R. § 799.1, supp. 3 (1994) (emphasis added).² The foregoing definition is distinctly different from that for "capable of":

Usable in or Capable of (MTCR context) -- Equipment, parts, components or "software" that are *suitable for* a particular purpose. There is no need for the equipment, parts, components or "software" to have been configured, modified or specified for the particular purpose. For example, any military specification memory circuit would be "capable of" operation in a guidance system.

^{1.} The interpretation literally excludes "associated" and "incorporated" computers as defined in ECCN 1565. That ECCN in turn defines the quoted terms as encompassing computers that can be used for other purposes or removed from the equipment or systems in which they are found and that are not essential to the operation of such equipment or systems.

^{2.} The EAR were moved from 15 C.F.R. pts. 368-399 to 15 C.F.R. pts. 768-799 in September 1988. 53 Fed. Reg. 37751 (1988).

Id. (emphasis added).

Until late 1996 the government controlled as munitions most hardware and software capable of encrypting data. See 22 C.F.R. § 121.1, categ. XIII(b) (1994). Exceptions to this requirement were few and were narrowly drawn. See E. Hirschhorn & D. Peyton, Uncle Sam's Secret Decoder Ring, WASH. POST, June 25, 1992, at A23. One of these narrow exceptions covered encryption devices "specially designed, developed or modified for use in machines for banking or money transactions, and restricted to use only in such transactions." 22 C.F.R. § 121.1, categ. XIII(b)(1)(ii) (1994) (emphasis added). If "specially designed" means "capable of," the government excepted from its tight encryption controls far more than it intended to release.³

Elsewhere, the munitions export control regulations provide that "[v]essels of war means vessels . . . designed, modified or equipped for military purposes." 22 C.F.R. § 121.15 (1994) (emphasis added). All vessels of war are controlled as munitions. 22 C.F.R. § 121.1, categ. VI(a) (1994). Surely "specially designed" is narrower than "designed," yet if "specially designed" means "capable of," then all vessels, including rowboats, paddle boats, and canoes, are vessels of war and controlled as munitions for export purposes.

Finally, we find guidance in that most common of books, the dictionary. "Special" means "exceptional," "[d]istinct among others of a kind," "particular," and "[h]aving a limited or specific function, application, or scope." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1240 (1971). If an item is "specially" designed, then, it is designed for a particular or limited purpose. In addition to being inconsistent with the regulations and with the long standing custom and usage of the government and exporters, the definition of "specially designed" proffered by the government in the *Lachman* case flies in the face of logic and the dictionary. *See Mallard v. U.S. District Court*, 490 U.S. 296, 301 (1989) (noting relevance of dictionary definitions in statutory interpretation).

The view of the Department of Commerce is consistent with the foregoing. As

That the quoted text appeared in the U.S. Munitions List (USML), which is part of the International Traffic in Arms Regulations (ITAR), rather than the EAR does not detract from its relevance. Because of the need to harmonize jurisdictional lines between the ITAR and the EAR, the EAR contained matching text in their "information security" subcategory. 15 C.F.R. § 799.1, supp. 1, categ. 5.II., advisory n. 4.c. (1994) ("[c]ryptographic equipment specially designed, developed or modified for use in machines for banking or money transactions . . . and intended for use only in such applications"). Further, the USML and the CCL are derived largely from the International Munitions List (IML) and the International List (sometimes called the Industrial List) (IL), respectively. Both the IML and the IL were products of the same body--the multilateral Coordinating Committee on Multilateral Export Controls (COCOM). Accordingly, the ITAR and the EAR must be read together.

recently as November 13, 1997, Under Secretary Reinsch's congressional testimony on high performance computer controls contained the following statement: "Traditional 'specially designed' defense systems were easier to protect than today's emerging dual-use civilian-military technologies because the owners of the technology were fewer and the markets more limited." Testimony of Hon. William A. Reinsch Before the National Security Committee, U.S. House of Representatives (Nov. 13, 1997), at 3 (downloaded from BXA web site) (emphasis added). If "specially designed" means "capable of," Mr. Reinsch's statement makes no sense. Computers capable of performing militarily useful computations long have been widely available. The only possible meaning of the quoted statement is that computer systems with unique properties making them useful for military purposes were not widely available until recently.

Numerous affidavits filed in the *Lachman* case state that in 1988 the Department of Commerce was telling exporters that an item is "only specially designed for a product or purpose if it can only be used for that product or purpose." These came from Richard J. Sheil (a former BXA employee), Daniel E. Cook (former BXA employee), John R. Black, Jr. (former BXA employee), and Harald H. Roth.

As demonstrated by an affidavit from William Root (former director of the Office of East-West Trade at the State Department) and a COCOM "Record of Discussion" dated March 3, 1975, the United States consistently took the same position in international negotiations, which effectively represent the legislative history of COCOM-controlled items on the CCL. "The control lists of participating governments are based on the CoCom lists, and the regulations of many participants, including the United States, incorporate virtually the complete text of International List (IL) entries." Cecil Hunt, CoCom and Other International Cooperation in Export Control, in COPING WITH U.S. EXPORT CONTROLS 1991, 97, 106-07 (Evan Berlack & Cecil Hunt, eds., 1991). Mr. Sheil and Donald Hammond gave evidence that this also was the United States government's consistent internal working view.

Finally, the common understanding of the exporting community long has been that "specially designed" means "exclusively for" rather than "capable of." Various documents filed in the *Lachman* case bear this out. E.g., Affidavits of Roger L. Grossel and John Black.⁴ Those present at the ICOTT meetings at which this matter has been discussed have included trade association staff members, major exporters' officials who are responsible for export compliance by their firms, and attorneys with many years of experience in this field. Many formerly served as export control officials of the Commerce, State, or Defense Departments. These individuals unanimously and unhesitatingly have agreed that "specially designed" has the narrow meaning outlined above ("exclusively for" or "limited to") and not the broad meaning ("capable of" or "effectively capable

^{4.} Messrs. Grossel and Black are former export control officials of the Defense and Commerce Departments, respectively.

of") advanced by the government in Lachman but nowhere else.

ICOTT urges that BXA remove the phrase "(MTCR context)" from the existing definition of "specially designed" in Part 772 of the EAR. Although, as indicated above, we oppose having two different definitions of the same phrase, an alternative would be to add the following definition of the phrase immediately preceding the existing definition:

"Specially designed". (non-MTCR context)-- A product or a component is specially designed for a certain product or purpose if it can only be used for that certain product or purpose.

The regulatory text, the government's own public and internal view (at least outside the *Lachman* courtroom), and the common understanding of the exporting community demonstrate that "specially designed" means "usable solely for a particular purpose." The definition employed by the government in COCOM negotiations in 1975, the definition employed by the government in the 1991 definitions, *supra* at 3, and the implied definition of the phrase as used in Under Secretary Reinsch's November 1997 congressional testimony are the same. So far as ICOTT is aware, the government's interpretation has not changed since at least 1975. Indeed, former Director Root's comments on this issue, dated November 14, 1997, make a strong case that the interpretation has not changed since 1951. There is no reason to alter the meaning of the term today.

ICOTT comprises five high technology trade associations—the American Association of Exporters and Importers (AAEI), the American Electronics Association (AEA), the Electronic Industries Association (EIA), Semiconductor Equipment and Materials International (SEMI), and the Semiconductor Industry Association (SIA). Many of the thousands of individual firms belonging to these trade associations export controlled goods and technology from the United States. Although ICOTT's formal membership is restricted to trade associations, representatives of most major computer, electronics, and software manufacturers and exporters are active in ICOTT's work.

Since its founding in the early 1980s, ICOTT's principal purposes have been to advise U.S. Government officials of industry concerns about export controls and to inform ICOTT's member trade associations (and their member firms) about the U.S. Government's export control activities. As part of its work, ICOTT monitors export control legislation and regulations, the government's interpretations of those rules, and judicial decisions addressing export controls.

We would be pleased to meet with you or your staff to discuss this issue further.

Boyd J. McKelvain

Chair, Coordinating Committee

Sincercity

Eric L. Hirschhorn

Executive Secretary

Enclosures/2

ICOTT INDUSTRY COALITION ON TECHNOLOGY TRANSFER 1400 L Street, N.W. Washington, D.C. 20005 Suite 800 (202) 371-5994

June 20, 1995

VIA HAND DELIVERY

The Honorable William A. Reinsch Under Secretary for Export Administration Bureau of Export Administration U.S. Department of Commerce Room 3898 14th Street and Constitution Avenue, N.W. Washington, D.C. 20230

Re: Definition of "Specially Designed"

Dear Mr. Reinsch:

During the recent trial of *United States v. Lachman et al.*, Judge Woodlock of the United States District Court for the District of Massachusetts gave a jury instruction concerning the definition of "specially designed" commodities. This instruction is inconsistent with Commerce Department custom and practice. Accordingly, we ask that the Bureau of Export Administration announce formally the meaning of "specially designed" and notify Judge Woodlock of such definition.

The defendants in Lachman were charged with exporting a control panel for a hot isostatic press without obtaining a required export license. At trial, Dr. Surendra Dhir, the former Commerce Department employee who presumably would have classified the control panel had the defendants had requested a classification, testified that "specially designed" meant "effective capability to control." Thus, Dr. Dhir concluded that the control panel was "specially designed" because it had "effective capability to control" a hot isostatic press.

Apparently relying on Dr. Dhir's testimony, Judge Woodlock instructed the jury that "specially designed" has two elements: intentional design and capability to control. This definition is inconsistent with BXA's own interpretation of the same phrase and hence inaccurate.

The Honorable William A. Reinsch June 20, 1995 Page 2

In 1988, Dick Sheil, a Commerce Department official, reportedly told participants at a seminar regarding the Export Administration Regulations that "[a] product or a component is only specially designed for a certain product or purpose if it can only be used for that certain product or purpose." This "exclusive use" definition is incorporated into the EAR definition of "specially designed" for purposes of missile technology controls. See 15 C.F.R. § 799.1, supp. 3. Moreover, a declassified COCOM document--COCOM Doc. Rev. (74) 1086/3--indicates that the U.S. government's position is that "what was meant by "specially designed" was equipment used solely for a particular purpose." Accordingly, we believe that the "exclusive use" definition is the appropriate interpretation of "specially designed."

While the U.S. government has accepted the "exclusive use" definition with regard to some items, it has resisted employing such a definition in all contexts because it supposedly might effectively decontrol many components. As a compromise between the overinclusive "capable of" definition and the underinclusive "exclusive use" definition, the Commerce Department uses a "required" definition for technology and software. Thus, technology or software is "specially designed" if it is "required"—i.e., "peculiarly responsible for achieving or exceeding the embargoed performance levels, characteristics or functions."

Whether BXA uses the "required" or the "exclusive use" definition for specially designed commodities, both are narrower than Judge Woodlock's overly-broad "intentional design/capability to control" definition. However, based on Dr. Dhir's testimony the judge understandably believed that he was complying with a long-standing BXA interpretation of "specially designed." To rectify this misunderstanding, we urge that BXA adopt the "exclusive use" definition as part of the current revision of the Export Administration Regulations or as an independent regulatory reform.

ICOTT is a group of major trade associations (names listed below) whose thousands of individual member firms export controlled goods and technology from the United States. ICOTT's principal purposes are to advise U.S. government officials of industry concerns about export controls and to inform ICOTT's member trade associations (and in turn their member firms) about the U.S. government's export control activities.

incerely.

McKel√ain

Eric L. Hirschhorn Executive Secretary

The Honorable William A. Reinsch June 20, 1995 Page 3

cc: John Despres

Sue Eckert Hoyt Zia Cecil Hunt Pamela Breed Frank Deliberti Iain Baird

ICOTT Members

American Association of Exporters and Importers (AAEI)
American Electronics Association (AEA)
Computer and Communications Industry Association (CCIA)
Electronic Industries Association (EIA)
Information Technology Association of America (ITAA)
Information Technology Industry Council (ITI)
Semiconductor Equipment and Materials International (SEMI)
Semiconductor Industry Association (SIA)



UNITED STATES DEPARTMENT OF COMMERCE The Under Secretary for Export Administration Washington, D.C. 20230

September 25, 1995

Mr. Eric L. Hirschhorn Executive Secretary, Industry Coalition on Technology Transfer 1400 L Street, N.W. Washington, D.C. 20005

Dear Mr. Hirschhorn:

Thank you for your letter cosigned by Boyd McKelvain requesting that the Bureau of Export Administration (BXA) "announce formally" the meaning of the term "specially designed" as it is used in the Export Administration Regulations (15 C.F.R. §§768-799). You also requested that BXA notify Judge Woodlook of the United States District Court for the District of Massachusetts of this announcement.

As you know, this issue is currently in litigation in United States v. Lachman et al., over which Judge Woodlock is presiding. I believe it would be inappropriate for BXA to interfere with a matter currently in litigation. I am sorry for the delay in responding, although I am sure you understand the circumstances.

I appreciate your interest and comments on this issue.

Sincerely,

William A. Reinsch



Vickey R. Roberts

Manager Import/Export Honeywell Inc.

21111 North 19th Avenue Phoenix, AZ 85027

602 436-2048 602 436-3185 Fax

December 18, 1997

Regulatory Policy Division Room 2096 Office of Exporter Services Bureau of Export Administration Department of Commerce PO Box 273 Washington, DC 20044

Attn: Hillary Hess

RE: Comments on the Definition of "Specially Designed", Federal Register 56138, October 29, 1997

When classifying products under the Commerce Control List where the term "specially designed components therefor" is addressed we view all units that complete a particular system with no current application or usage with other products to fall under "specially designed". If components were designed and built specifically for a next higher assembly unit, with only the one application, then we also consider the component(s) to fall under the "specially designed" designation. When talking systems or assembled components designed solely for use only with a particular system or unit then it falls under "specially designated" terms.

Yours truly,

Vickey Roberts
Vickey Roberts

Import/Export Compliance Manger

December 19, 1997

Ms. Hillary Hess
Regulatory Policy Division (Room 2096)
Office of Exporter Services
Bureau of Export Administration
Department of Commerce
P.O. Box 273
Washington, DC 20044



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C. Christopher Kelly Vice President-Finance

James H. Mack Vice President-Government Relations

Patrick W. McGlbbon Vice President-Industry Marketing Services

George E. Rathke Vice President-International Trade

Tracy L. Williams Director-Operations Improvement Dear Ms. Hess:

This letter is written in response to the request in the *Federal Register* of October 29, 1997 for comments on the use and definition of the term "specially designed."

Recommendation

I recommend the use of the definition found in the MTCR, and repeat here that portion which pertains to my area of expertise.

...a piece of manufacturing equipment that is "specially designed" to produce a certain type of component will only be considered such if it is not capable of producing other types of components.

Background and Comment

Mr. William Root has conducted exhaustive research into COCOM documents and found no conflict with the MTCR definition. In fact, where the documentation is in some detail, it explicitly supports the idea of "used-solely-for." You have a copy of Mr. Root's documentation.

I have polled my counterparts in other Wassenaar nations who are major machine tool exporters and find that they all would support the MTCR definition as universal. In fact, they and their governments find it awkward to have the term explicitly defined in one regime, but used and not defined in another (Wassenaar).

As one who has participated in many list review and editing exercises (internationally), I can report that the term "specially designed" has become a crutch whereby experts leave it to the various national licensing agencies to determine if an item is to be judged "specially designed." This tends to exacerbate the problem of uneven list interpretation which can lead to providing a competitive advantage for some nations depending on their interpretation. There is no reason why experts cannot find terms and specifications to describe explicitly a product to be controlled.

For reasons cited above, I would also oppose the selection of more than one definition for the term. This would only lead to further confusion.

Thank you for this opportunity to comment.

Sincerely,

Charles F. Carter, Jr.
Chairman of the Materials Processing

Equipment Technical Advisory Board

" Carter

CFC:sch

Dr Gregory C. De Santis 862 Trevino Terrace Lady Lake FL 32159 Tel: (352) 750-0650 FAX: (352)750-3890

20 December 1997

Ms Hillary Hass Regulatory Policy Division Room 2096 Department of Commerce PO Box 273 Washington DC 20044

Dear Ms Hass,

In response to your Federal Register notice requesting comments on the definition of the term "specially designed", I submit the following comments.

Notes:

- 1. All of the documents referenced in this paper are unclassified or have been declassified by the National Archives, the COCOM repository in Paris, or the Department of State.
- 2. The word "embargo" does not mean an export prohibition. It means that a valid export license is needed to export the item.

COCOM Usage of the Term "specially designed":

I have reviewed a number of Department of Commerce COCOM documents stored in the National Archives and available from the COCOM repository in Paris, and found that only one definition of "specially designed" has been consistently used by the international export community. That definition is basically similar to the one established by the Missile Technology Control Regime. In fact, the definition is uniquely two dimensional in that it has remained relatively unchanged from approximately the mid 1950's to the present, and spans the full range of controlled commodities.

The term "specially designed" can be found in COCOM documents as far back as 1952. It is also interchangeable with the word "speciallised" (British spelling) which was used to describe the same commodities. This is illustrated in COCOM Document No. 813 (July 18, 1952). In that document, the United Kingdom discusses the application of COCOM Administrative Principle No. 4 as it applies to the export of parts. The UK categorizes parts into

three groups: those which are specially designed and vital, those which are specially designed and not vital, and those which are general purpose and not controlled. This paper is important because it brings out the first key characteristic of the term "specially designed" which includes the principle of "specially designed" parts being unique. It also raises the issue that only "specially designed" parts should be controlled, and not general purpose parts which are common to both controlled and uncontrolled commodities. Each of these points have been faithfully been carried forward by the export community to the present control lists.

Another milestone in the definition of "specially designed" occurred in 1956. The Netherlands asked COCOM for permission to export equipment "specially designed" to manufacture television picture tubes (valves) to a Soviet Bloc country. The documents describe the discussions which took place in COCOM. In Document No. 2336 we find the basic form of the definition of "specially designed" when the Netherlands Delegate states:

"This equipment has been specially designed for the purpose in question and cannot be used for other purposes."

In Document No. 2331, the US Delegate argues the equal and opposite corollary to the Netherlands position when he states that the US believes the equipment is not "specially designed", but general purpose equipment capable of manufacturing a variety of embargoed tubes. Then in Document No. 2345, the UK Delegate agrees with the Netherlands statements. By their statements, all three nations agreed that "specially designed" meant designed for a singular unique purpose and was not capable of being used for another purpose.

The US Department of Commerce went even further in supporting the unique and singular usage of the term "specially designed" when it began supplying COCOM member countries copies of its Commodity Identification Manual under COCOM Document No. 1866. Within this document, Commerce not only used the term "specially designed", but also provided pictures and descriptions of the "specially designed" items. As an example, the Manual describes "specially designed" oscillograph cameras. From the descriptions and pictures, it is obvious that these cameras have only one use and are not capable of general photography.

During the 1958 COCOM List Review, the United States succeeded in removing open-loop and non-computer based control units from the COCOM lists of embargoed items. Instead, the US proposed a control on "electronic automatic controlling units" which contained either a "electronic computer and/or an electronic feedback stabilized amplifier" (closed-loop) in COCOM Item 1315 (Reference: US COCOM submission documents). This new embargo eventually evolved into an embargo on general purpose control units in COCOM Item 1529 and numerical control units in the machine tool embargo. In the late 1970's, Norway asked COCOM for an exception to the embargo for a Kongsberg numerical controller Model 600 FC (COCOM Definitional Document (76) 1091/4) which was "specially designed" for flame cutting and was not capable of being used for any other type of metal removal equipment. During the discussion of this case, a "listing proceedure" was established to remove other flame cutting numerical

control units from embargo. This proceedure became known as Interpretive Note 23 to Item 1091 in Annex B to the COCOM Lists.

The Note specifically reads:

"The following types of numerical control units, without interface to enable data exchange with another computer, which are specially designed for flame cutting equipment and which cannot be used effectively in this configuration on metal removal equipment embargoed by Item 1091, are exempted from embargo. This exemption applies only to the units specifically described in the documents referenced below and with the characteristics set forth therein: "

The significance of this Note to the request for comments in the Federal Register is that the Capital Goods Division of the Department of Commerce submitted at least two and possibly more US origin numerical control units for listing under this Note. In making these submissions, the US provided technical documentation and had to assert that the control units were "specially designed" for the singular use with flame cutters and could not be used with any other type of metal removal equipment.

During the negotiations on COCOM Item 1353 (Cable Making Machinery) on May 31 1962, there was an extensive discussion of the meaning of "specially designed". One of the key points made during the discussion was by the French Delegate. His contribution to the definition was the emphatic statement that "specially designed" did not mean 'capable of'". The point was made so strongly that the State Department Representative included it in his Reporting Message back to Washington. He also included a statement that the German Delegate supported the French position. The German Delegate must have been impressed with the discussion because he made reference to the French statement a few years later during the negotiation of another COCOM item. There is a consistent pattern of one single definition of "specially designed" in COCOM because the French made similar statements the previous year in COCOM Document 4349 on January 9, 1961.

In addition to the documentation referenced above, there are still many more documents which remain classified that support the singular definition of "specially designed" embodied in the MTCR definition. There are also numerous COCOM Definitional Documents which have been reviewed by licensing officers dealing with the control or decontrol of "specially designed" commodities. From my 18 years of experience in export control, I cannot recall a single case in which any other definition was used in processing these COCOM cases.

MTCR Usage of the Term "specially designed":

I participated in the development of the definition of the term "specially designed" in the Missile Technology Control Regime (MTCR). Before discussing the development of the

definition, it is important to understand the reason for having a definition. The MTCR places a total prohibition on the export of missiles, production equipment and certain components in Category I Items 1 and 2. Some of the MTCR member nations are major exporters of tactical missile systems and were concerned that some of the production equipment and components in tactical missiles would be prohibited under the MTCR. Also some of the equipment used to make Category I missiles was used to manufacture non-MTCR missiles. By having a definition for "specially designed" it was possible to narrow the coverage within the MTCR to only that equipment and components which were unique to Category I missiles and not include those components and equipment for tactical missiles which were beyond the intent of the MTCR.

As I recall, the development and acceptance of the definition by the MTCR member nations was relatively short, compared with other negotiations. I believe that this was due to three factors: everyone understood the need for the definition; many of the MTCR controls parallel the COCOM controls and most of the key nations were members of COCOM. Relative to the last two factors, these nations drew from the historical COCOM usage of the term "specially designed"; years of practical experience with the term; and the desire to have a definition which did not conflict with COCOM usage. The unwritten corollary to the MTCR definition is:

"Equipment and components common to both Category I missiles and non-Category I missiles are not "specially designed" for either."

Other Nations Usage of the Term "specially designed":

Two important members of COCOM and MTCR are the United Kingdom and Germany. Both of these nations have documented evidence that the MTCR definition of "specially designed" is the prevailing usage of the term in export matters. The "Scott Report" which looked into the Matrix-Churchill case contains a statement from the UK's DTI that their usage of the term is similar to the MTCR definition. In a trial in Germany, a COCOM document was produced which also contains a definition of "specially designed" similar to the MTCR definition, and this has become the prevailing usage in Germany, as a result.

Conclusions:

- 1. There is sufficient documentation to support the position that COCOM has used a single definition of "specially designed" since at least 1956 (or possibly 1952).
- 2. The Department of Commerce has used a single definition since it published the Commodity Identification Manual in 1955.
- 3. The Capital Goods Division of the Department of Commerce has used a definition which is similar to the MTCR definition since 1976.

- 4. The one single definition of "specially designed" has been applied to almost all the items in both the COCOM and MTCR lists.
- 5. At no time in the COCOM records has the term "capable of" been included in the definition of "specially designed".
- 6. At least two other nations which are members of both COCOM and the MTCR use a definition which is similar to the MTCR definition.

Recommendation:

The MTCR definition is consistent with all previous usage of the term "specially designed", so the reference to "MTCR only" should be removed from that definition. It would also be wise to add the following to the definition for even greater clarity:

"Parts, components, systems and materials common to both a controlled and uncontrolled commodity are not 'specially designed' for either."

Gregory C. De Santis

COMMENTS ON DEFINITION OF SPECIALLY DESIGNED

Our view is that the following categories of items and the specific items identified do not fall within the definition of specially designed, etc:

- 1. Items that are commercially available in accordance with catalogue design specifications for use in a variety of applications, including nuclear plants.
- Items that are commercially available, as above, which are required to be tested or pedigreed for nuclear application

- Examples of above items are identified below in association with certain systems within a nuclear plant.

- a. Items used in a Containment Atmosphere Monitoring Systems. These items are basically standard-off-the-shelf items for sampling and measuring temperatures, pressures, moisture, and gases. They include a variety of instruments, valves, piping, pumps, and transmitters (specifically: manometers, barometers, thermometers, vacuum pumps, compressed air fittings, gas monitor, ducts, particulate monitor, and carbon absorbers).
- b. Items used in a shutdown cooling systems. These include off-the-shelf type heat exchangers, pumps, piping, and valves.
- c. Items used in Containment Spray Systems. These include pumps, heat exchangers, nozzles, piping, and valves.
- d. Items used in Liquid Waste Management Systems. These include collection and sampling tanks, process pumps, demineralizers and filters, piping, and valves.
- e. Items used in Component Cooling Water Systems. These include piping, heat exchangers, pumps, surge tanks, sump pumps, and valves.

As noted above, ECCN 2A291 gives 3 examples of items "specially designed", one of which is "snubbers". While snubbers may have been specially designed for the earlier nuclear plants, snubbers are now generally standard items for use in a variety of applications including nuclear plants and are catalog items available from many "pipe support" vendors. Therefore, citing snubbers as an example in 2A291 is no longer appropriate.

If there are any questions or need for additional information, please contact me at 617-589-1286 or Fax me at 617-589-5892.

Sincerely,

a Sixamburro

A. Giambusso Vice President

SIA SEMICONDUCTOR INDUSTRY ASSOCIATION

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December 29, 1997

Ms. Hillary Hess Regulatory Policy Division, Room 2096 Office of Exporter Services Bureau of Export Administration U.S. Department of Commerce P.O. Box 273 Washington, D.C. 20044

Re: Request for Comments on the Definition of "Specially Designed"

(62 Fed. Reg. 56138, Oct. 29, 1997)

Dear Ms. Hess:

The Semiconductor Industry Association ("SIA") would like to offer comments on the definition and use of the term "specially designed" within the Export Administration Regulations ("EARs"). SIA represents over 60 U.S.-based semiconductor manufacturers and over the past 20 years has worked to address common issues and concerns of the semiconductor industry.

"Specially designed" is a modifier or qualifying term used extensively in classifying items on the Commodity Control List of the EARs. The same term is used with respect to classifying items on the Munitions List of the International Traffic in Arms Regulations (ITARs), although there the term used most frequently for this purpose is "specifically designed" rather than "specially designed." These terms serve the same basic function in both regimes: they differentiate items that qualify for export control.

The term "specially designed" is of particular importance for parts, components and subassemblies. These items tend to be more generic in character than end products and are usually capable of broader application. For example, microcircuits and semiconductors are widely used as parts and components; when they are placed on a printed circuit board, the resultant product is likely to be a subassembly. These items are often classified according to whether they are specially designed. If the term has no clear bounds or cannot be readily understood, the scope of the regulations will become confusing, overreaching and unfair.

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If the Commerce Department seeks to define "specially designed," SIA recommends that the definition follow common sense and well established commercial practice. The definition should contain two elements. First, it should be based upon particular, predetermined design goals or objectives. These can be evidenced by drawings, specifications or configurations. Second, there should be a clear purpose or intent that the item be used in a particular application. The result of these elements is an item aimed at a unique or exclusive application. In short, a specially designed item is for a specific purpose rather than a general purpose.

Developing a clear demarcation between products "specially designed" for unique and specific applications and general purpose products which are merely and incidentally capable of certain applications is critical for a functioning regulatory system. The difference between special purpose and general purpose products begins with the design process but is reflected in manufacturing, marketing and pricing.

Without the clear demarcation offered by a narrow definition of "specially designed," a regulatory classification system is unpredictable and unreliable. "Specially designed" is well understood in commercial practice. This understanding should not be arbitrarily altered by after-the-fact determinations regarding capabilities that do not reflect the original design goals and purpose for the commodity. Meeting the objectives of the regulatory system can best be achieved by adjusting the control requirements rather than distorting sensible and well understood commodity definitions. To do otherwise will inevitably undermine the integrity of the regulatory regime.

Historically, export control regulations and their interpretation, with few exceptions, have provided a satisfactory demarcation between specific and general purpose commodities. There have, however, been departures that have caused major problems for the semiconductor industry and the regulatory regime. The most recent example involves treatment of radiation-hardened semiconductors. Due to technological advancements in the manufacturing process, commercial semiconductors increasingly can withstand threshold radiation effects reserved for devices specially or specifically designed for radiation hardening under the Missile Technology Control Regime in the case of the EARs, and under the Munitions List in the case of the ITARs. Despite the incidental and unintentional capabilities of such semiconductors, after-the-fact testing has been offered as a basis for reclassifying the devices as specially or specifically designed for purposes of radiation hardening. Such an approach does violence to industry practice as well as the export classification system. See attached White Paper.

The codification of a definition of "specially designed" consistent with a narrow interpretation of the term is essential for an effective regulatory approach to commodity classification. The resultant demarcation will provide the necessary clarity, predictability and utility for the commodity classification process. The alternative will result in endless

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complications, confusion and unfairness on the part of the semiconductor industry and others. SIA urges the Department of Commerce to recognize the need for a clear-cut and logical approach to designating commodities "specially designed," as well as the havoc a broader interpretation would provide to the regulatory system and U.S. industry.

Sincerely, David Rose wen

David Rose Chairman

SIA Export Control Committee

SIA Position Paper

on

Export Control Treatment of Radiation-Hardened Devices

I. INTRODUCTION

It has been the long-standing position of the Semiconductor Industry Association ("SIA") that semiconductors and related technology constitute electronic circuitry that is not inherently military in character. As such, semiconductors should not qualify as munitions and be subject to the International Traffic in Arms Regulations ("ITAR"). Instead, semiconductors should be treated as dual-use items under the Export Administration Regulations ("EAR") administered by the Commerce Department.

Nonetheless, the State Department's U.S. Munitions List ("USML") provides two grounds upon which semiconductors can qualify as defense articles: semiconductors must either be "specifically designed or modified" for military end-use articles¹ or "specifically designed or rated" to provide an extraordinary level of protection against radiation.² With regard to semiconductors controlled as dual-use items by the Commerce Department, such devices are subject to missile technology controls if they are "designed or rated" to provide protection against radiation, but the threshold radiation level is much lower than that of the USML.³

SIA is concerned that the U.S. Government has recently been construing the terms "specifically designed or rated" under the ITAR and the terms "designed or rated" under the EAR in a subjective and overly broad manner. This has occurred in the context of Defense Department initiatives to expand use of commercial off-the-shelf products in U.S. military systems. The result has been with respect to defense applications widespread testing and use of semiconductors designed and manufactured for civilian use. This has led to much confusion and threatens to greatly expand controls on devices that should not in any meaningful way qualify as radiation-hardened.

SIA believes that U.S. "rad-hard" controls should be implemented in a more objective and consistent fashion. This paper sets forth SIA recommendations for assessing radiation hardness under the ITAR and EAR.

See, e.g., 22 C.F.R. § 121.1, USML, Category IV(h); see also id. at Category VIII(h).

See id. at Category XV(f)(5).

See 15 C.F.R. § 774, Supplement No. 1, Export Control Classification Number ("ECCN") 3A001.a.1.a.

II. CONTROLS ON RADIATION-HARDENED SEMICONDUCTORS

a. Treatment as a Munition

The ITAR controls semiconductors with radiation-hardened capabilities only if the devices are "specifically designed or modified" for use with defense articles⁴ or:

specifically designed or rated to meet or exceed all five of the following characteristics:

- (i) A total dose of 5 X 10⁵ Rads (Si);
- (ii) A dose rate upset of 5 X 10⁸ Rads (Si)/Sec.;
- (iii) A neutron dose of $1 \times 10^{14} \text{ N}^{-2}$;
- (iv) A single event upset of 1 X 10⁻⁷ or less error/bit/day; and
- (v) Single event latch-up free and having a dose rate latch-up of 5 X 10⁸ Rads(Si)/sec or greater.⁵

The latter control parameters were codified by the State Department in September 1993 pursuant to understandings reached between representatives of the U.S. Government and the U.S. semiconductor industry within the framework of the Space Technology Working Group ("STWG").⁶

With regard to "rad-hard" semiconductors that have not been designed or modified for incorporation into military end-use items, technical data must be "directly related" to such devices to fall within the scope of ITAR controls.⁷

b. Treatment as a Dual-Use Item

Under the EAR, semiconductors offering radiation protection are subject to missile technology controls if the devices are "designed or rated as radiation hardened to withstand... [a] total dose of 5 X 10⁵ Rads (Si), or higher." These controls emanate from the Missile Technology Control Regime ("MTCR").

⁴ <u>See</u> 22 C.F.R. § 121.1, Category XI(c).

 $[\]underline{\text{Id.}}$ at Category XV(f)(5).

See 58 Fed. Reg. 47636, 47638-9 (Sept. 10, 1993). The purpose of the STWG was to "identify and recommend for removal from the USML commercial satellites and related articles . . . except where such movement would jeopardize U.S. national security interests." See id. at 47,637 (emphasis added).

⁷ 22 C.F.R. § 121.1, Category XV(g).

⁸ 15 C.F.R. § 774, Supplement No. 1, ECCN 3A001.a.1.-a.1.a.

Technology for the "development" or "production" of "rad-hard" devices is subject to missile technology controls.⁹

c. Prerequisites for the Imposition of Munitions or Missile Technology Controls on "Rad-Hard" Devices

Certain prerequisites must be satisfied before ITAR munitions or EAR missile technology controls can be imposed on semiconductors with radiation-hardened capability. Under the ITAR, devices must either be "specifically designed or modified" to serve as components for munitions or "specifically designed or rated to meet or exceed" five (5) criteria. Under the EAR, missile technology controls govern semiconductors only if the devices are "designed or rated" to withstand a total dose of 500,000 rads. No reference is made in these ITAR and EAR provisions about the capability of semiconductors to provide protection against radiation. Therefore, it would appear that they do not authorize the imposition of munitions or missile technology controls on semiconductors solely based upon their capability to withstand radiation.

III. RECENT U.S. GOVERNMENT EFFORTS TO EXPAND "RAD-HARD" CONTROLS WITHOUT REGULATORY AMENDMENTS

Within the past year, State and Defense Department officials have been developing interpretations of the ITAR and EAR that would expand the scope of "rad-hard" controls to govern:

- (1) devices that are merely capable of withstanding the prescribed dosages of radiation; and
- (2) dual-use semiconductor technologies since such technologies can be utilized to produce devices that have "rad-hard" potentiality.

As a result of these new interpretations, manufacturers of commercial semiconductors have often been required by the U.S. Government to demonstrate, either through testing or "convincing presentation," that their standard products do not meet or exceed the ITAR or EAR criteria for control of radiation-hardened devices.

Recent re-interpretations of the ITAR and EAR "rad-hard" criteria lack sufficient objectivity and predictability to serve as an appropriate standard for industry or do not appear to offer any value to national security interests.

⁹ <u>Id.</u> at ECCN 3E001.

IV. <u>CONSEQUENCES OF MAINTENANCE AND EXPANSION OF NEW REGULATORY INTERPRETATIONS</u>

The global semiconductor industry has undergone a technological transformation such that modern commercial semiconductors (designed on commercial manufacturing processes) often can withstand the minimal radiation effects experienced in space and related equipment applications. A large percentage of commercial semiconductors have the "capability" to protect against the levels of radiation set forth in Commerce Control List ECCN 3A001.a.1.a., notwithstanding the fact that they have not been "designed or rated" to offer such protection. Additionally, some of these commercial devices are also "capable" of meeting all five (5) ITAR Category XV radiation hardness criteria.

Without objective constraints on interpretations of the "rad-hard" controls, the scope of these controls will, most likely, continue to expand. U.S. producers could be required to test and rate thousands of commercial semiconductor product types for radiation-hardness. Unless carefully controlled and done in accordance with proper standards, such testing can be quite unreliable. It can also be extremely expensive and place U.S. semiconductor manufacturers at significant cost and marketing disadvantages in the international market.

Expansion of controls can be expected to increase dramatically the volume of export licenses processed by the U.S. Government. Licensing bottlenecks would inevitably be created in a licensing process already known for its frequent and lengthy delays.

V. SIA RECOMMENDATIONS

a. Semiconductor Devices

With regard to semiconductors for incorporation in civil end-use items, SIA recommends that ITAR or EAR "rad-hard" controls should apply to such devices only in cases where the devices have been "designed" or "rated" by the original manufacturer to satisfy the applicable performance parameter(s). "Rad-hard" controls should not be imposed on devices that are merely "capable" of meeting some or all of these parameters since explicit ITAR and EAR prerequisites have not been fulfilled.

To improve the objectivity of the "rad-hard" controls in the ITAR and EAR, SIA urges the U.S. Government to employ definitions for key regulatory terms that are consistent with the earlier conclusions reached by the government in the 1992-1993 reviews.

SIA proposes the following definition for the term "designed":

"Designed" means a microelectronic circuit developed with the intention at the initiation of circuit development to meet certain pre-determined specifications and performance parameters. Usually these specifications are set based on known and/or perceived customer requirements.

Note (1): In the context of ITAR Category XV, Radiation -Hardened Microelectronic Circuits, this means pre-determined design goals with the "intent" of producing a circuit that simultaneously meets and/or exceeds all five (5) Government-specified radiation criteria.

Note (2): In the context of EAR 3A001.a.1.a. (Missile Technology Control Regime) Radiation Hardened Microelectronic Circuit, this means predetermined design goals with the intent of producing a circuit that meets 500k rad/Si total dose or greater.

For the requisite intent to exist, SIA believes that there should be objective indicators that one purpose of production is to meet or exceed the ITAR or EAR "rad-hard" criteria. Such indicators could include the existence of drawings or specifications setting forth radiation protection as an objective of the production process. For the term "rated," SIA proposes the following definition:

"Rated" means the measurement, recording and publishing of the microelectronic circuit's electrical and/or radiation hardness parameter which a semiconductor manufacturer "guarantees" to its customers and accepts the financial risk and product failure liability consequences.

Note (1): "Published" means released to the general public by an authorized representative of the company (not data by third parties who conduct tests on their own initiative).

Note (2): "Guarantees" of an electrical and/or radiation performance are based on:

- a) actual testing of the individual wafer or lot,
- b) testing of a process and controlling the process for deviations, and
- c) engineering judgment based on previously performed tests, qualification, characterization, and stability of a given process and/or design over time.

U.S. Government implementation of these definitions would comport with the semiconductor industry's current practice of certifying military and aerospace grade parts that are "designed" or "rated" to be "rad-hard." It would also control strategically-significant devices (i.e. Class I "rad-hard" devices) pursuant to the recommendations of the STWG. The STWG recognized that devices "rated" as radiation-hardened are qualitatively different from those that are merely capable of meeting the "rad-hard" criteria. The ability of "rated" devices to satisfy these criteria is guaranteed by the manufacturers. If the actual performance is inadequate, the manufacturer is liable. Rated devices provide the operational reliability that is essential for military systems.

In contrast, the "capability" of a semiconductor device refers only to the probability and potential that the part may meet certain parameters. Since a device's "capability" depends on a wide variety of factors and operating conditions, an end-user cannot reasonably rely on and a semiconductor producer will not guarantee the performance of a device solely on the basis of this feature.

b. Semiconductor Technology

With regard to ITAR controls on semiconductor technology, U.S. foreign policy and national security interests appear to be amply protected under the current system. All semiconductor companies that have developed the technology to intentionally produce Class I devices are subject to ITAR controls, which include Defense Investigative Service ("DIS") restrictions on the export of the technology. Under this system of controls, Class I-related technology is classified and subject to the vendor's Operational Security Plan.

SIA believes that there is no need to interpret the ITAR to cover the technology of semiconductor companies that accidentally (and in most cases unknowingly) produce occasional devices that exceed the ITAR "rad-hard" levels. These firms simply do not have the detailed knowledge or capability to achieve certifiable standards of ITAR level radiation hardness.

SIA recommends the modification of EAR missile technology controls to govern only those dual-use semiconductor technologies that directly relate to the production or development of devices designed or rated to the parameters set forth in ECCN 3A001.a.1. Otherwise, the scope of such controls could be interpreted to include the vast majority of purely commercial semiconductor technologies. Expansion of controls in this manner would not serve the national interest since commercial technologies are widely available. The only sure result would be a loss of competitiveness for the U.S. industry.

28 November, 1997

William Skidmore Acting Assistant Secretary for Export Administration Department of Commerce Washington, DC 20830

Mr. Skidmore,

The October 29, 1997 Federal Register requested interested parties, particularly individuals "... who have experience classifying items on the Commerce Control List." to submit suggestions for a definition the term "specially designed". From 1987 to 1990, I was Head of the Electronic Components Technology Center (ECTC), from 1990 to 1993. I represented DOC/BXA at COCOM, from 1993 1994, I was Head of the Computer/Telecommunication Technology Center and from 1994 till I retired, I was head of the Office of Strategic Trade and Foreign Policy Controls.

During that time, the organizations which I headed interpreted "specially designed" to mean that an item/software/technology could only be used in or for the item for which it was specially designed; i.e. it could not be used in or for another item. To that end, I propose the following definition:

"Specially designed" Equipment, parts, components, software or technology that are limited in their use to the equipment or system for which they were designed.

This definition is short and concise and is similar in meaning to the definition used in the Missile Technology Control Regime (MTCR). I think it is important that the intent of the definitions used in the CCL and MTCR be identical. If not, it is very confusing for both exporters and Licensing Officers and raises the question of why there is no harmonized interpretation within the U.S. Export Authorities

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February 24, 1998

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Washington, D.C. 20044

Re: Response to Request for Comments on the Export Administration Regulations Definition of "Specially Designed"

Dear Ms. Hess:

We are writing to provide comments in response to the Federal Register notice (the "Notice") published on October 29, 1997 by the Bureau of Export Administration ("BXA") requesting comments on the definition of "specially designed" under the Export Administration Regulations ("EAR"). 62 Fed. Reg. 56138. The views expressed herein are presented on behalf of the Section of International Law and Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Section of International Law and Practice of the American Bar Association, particularly its Export Controls & Economic Sanctions Committee, consists of lawyers having an interest and expertise in U.S. export controls and sanctions laws. The definition of "specially designed" is important both to us as lawyers and to those whom we advise and counsel.

We appreciate the opportunity to provide comments on what we believe to be an important legal provision that can affect many exporters. The EAR, like all laws, should be clear, transparent, and consistent in its application and means of application. A clear definition of the term "specially designed" is required to fulfill these goals. For the reasons discussed below, we are recommending that the current definition in the EAR be used for all contexts and not limited to the "MTCR context."

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In Iran Air v. Kugelman, 996 F.2d 1253 (D.C. Cir. 1993), the U.S. Court of Appeals for the District of Columbia (in an opinion by now Justice Ruth Bader Ginsberg) held, inter alia, that exporting a commodity that required an export license as a result of its classification under the EAR without obtaining such a license is a strict liability civil offense, meaning that the intent of the exporter is irrelevant in determining civil liability. Civil liability under the EAR can be severe for an exporter, ranging from substantial monetary penalties to denial of the privilege to export from the United States. Accordingly, proper export classification is essential for compliance with the EAR and to avoid substantial civil penalties.

Under the EAR, exporters are encouraged to classify products themselves. See EAR § 738.2(c). In doing so, exporters are encouraged to apply the definitions set forth in EAR Part 772 if the applicable ECCN does not contain a uniquely defined term contradicting them. See EAR § 738.2(d)(2)(iii)(B). BXA will provide export classifications in response to requests submitted pursuant to EAR § 748.3(a) & (b), but in practice, such classifications are generally issued in conclusory form, rarely explaining their basis. It is thus critical for words and phrases used in the Commerce Control List ("CCL") entries to have clear meanings that can be relied upon by exporters so that they can classify their products properly, comply with the EAR, and avoid violations.

More than 100 Export Control Classification Numbers ("ECCNs") in the EAR use the phrase "specially designed" in describing what products they control. Three of the definitions in Part 772 of the EAR use the term "specially designed" to aid in defining other terms. BXA should publish a single, clear definition of the term "specially designed" to make clear what these classifications cover, lest the bulk of the CCL be devoid of clear meaning.

The definition of the term "specially designed" that has existed in the EAR since 1991 is sufficient for all purposes and is consistent with how the term has been applied by BXA and other U.S. Government officials classifying products and advising industry on such classifications over the years. That definition is as follows:

Specially designed (MTCR context) — Equipment, parts, components or "software" that, as a result of "development", have unique properties that distinguish them for certain predetermined purposes. For example, a piece of equipment that is "specially designed" for use in a "missile" will only be considered so if it has no other function or use. Similarly, a piece of manufacturing equipment that is "specially designed" to produce a certain type of component will only be considered such if it is not capable of producing other types of components.

¹ See EAR § 764.3(a). Criminal penalties may also be imposed upon a showing of criminal intent to violate the EAR.

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15 C.F.R. § 772 (1996).² BXA should simply remove the parenthetical "(MTCR Context)" from this definition, as that is the way the term has been applied in practice by U.S. officials and by exporters (especially given that no other definition in the EAR exists).

We understand that the Regulations and Procedures Technical Advisory Committee ("RPTAC") and the Industry Coalition on Technology Transfer ("ICOTT") each made this same recommendation in the context of the wholesale rewrite of the EAR in 1995, and that both of these groups of experts on U.S. export control laws and policy are making similar recommendations now, citing historical data as to how the term has been used. Given the collective expertise embodied in those groups and this one, we hope that these consistent recommendations will be persuasive. There should not be multiple definitions for the same term.

In determining the proper definition of "specially designed," BXA should obviously bear in mind the purpose the definition is intended to serve, the Bureau's past practice and declarations, and the expectations of U.S. exporters. In particular, we believe that any definition of "specially designed" should be:

- Documented: In order for the definition reasonably to be relied upon by exporters and their counsel, and to ensure the accurate classification of goods and technology, the operative definition should be published and made available to the general public. Indeed, given BXA's goal (shared with the ABA) of transparency in administration of export control laws, it is problematic and disappointing that BXA has not provided the public with information as to how BXA officials have used the term "specially designed". In asking for comments on the subject, BXA should have advised the public how the term had been interpreted. That information would have enabled the public to provide more meaningful comments.
- Consistent with established usage of the phrase: The definition adopted should reasonably conform to the definition that has traditionally been applied by U.S. Government officials in their classifications and by industry representatives in their self classifications. We draw your attention to the testimony of numerous former BXA, Defense Department and State Department officials (described in more detail in comments submitted by ICOTT and by the RPTAC and by William Root, former Director of the State Department Office of East-West Trade) to the effect that the gravamen of the above-referenced definition has been applied by U.S. export control officials and partners thereof for many years. To alter the historical definition of such a key EAR term would undermine established practices and past reliance of U.S. exporters.

This same definition was in existence since BXA adopted in 1991 in former 15 C.F.R. § 799.1, Supp. 3 (1994), until the former EAR provisions in 15 C.F.R. §§ 770-799 expired at the end of 1996 after BXA had implemented the revised EAR in March 1996.

- Consistent with the multilateral use of the phrase: In order to ensure consistency with U.S. international obligations and to provide an even multilateral playing field, any definition of "specially designed" must reasonably conform to the interpretation used by our allies and advanced by U.S. officials in international settings, such as the former Coordinating Committee on Multilateral Export Controls and the Wassenaar Arrangement. (Again, see ICOTT, RPTAC, and Root comments for evidence that the use of the term outside the MTCR is consistent with the current EAR definition.)
- Consistent with a standard dictionary definition of the phrase: Any new definition of "specially designed" should be consistent with a standard dictionary definition of the operative term "special", which means "exceptional," "[d]istinct among others of a kind," "particular," and "[h]aving a limited or specific function, application, or scope." American Heritage Dictionary of the English Language 1240 (1971). See, e.g., Mallard v. U.S. District Court, 490 U.S. 296, 301 (1989) (noting relevance of dictionary definitions in statutory interpretation).

Finally, the definition should avoid the absurd result of striking meaning from the phrase. As discussed in the comments submitted by the RPTAC, certain definitions, such as "capable of" or "used with," threaten to "rob 'specially designed' of all meaning," since all parts and components are inherently used with, and capable of operating the equipment of which they are apart. The use of a definition that renders a phrase superfluous violates fundamental rules of statutory construction. Norman J. Singer, Statutes and Statutory Construction § 46.06, at 119 (5th ed. 1992) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.") (citations omitted).

We and our members would be pleased to meet with you or your staff to discuss this issue further if that would be helpful. Thank you for the opportunity to comment and for your consideration.

Respectfully submitted.

Timothy L. Dickinson

Section Chair

and

Edward L. Rubinoff

Chair, Export Controls and

Economic Sanctions Committee